IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWP No. 561 of 1999

Judgment reserved on: 2.8.2006

Date of Decision: August 22, 2006.

Hardyal Singh …Petitioner.

Versus.

Union of India & anr. .. Respondents.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for Reporting?

For the Petitioner(s): **Mr. O.P.Thakur, Advocate.**

For the Respondent(s): **Mr. Ravinder Thakur, Advocate.**

Deepak Gupta, J.

The petitioner in the present case initially joined the Agriculture Department of the State of Himachal Pradesh on 6.12.1961. Thereafter, he was selected in the Indian Army and joined as a Commissioned Officer on 19.1.1964. In the year 1965, the Border Security Force Act (for short: BSF) was promulgated and the BSF was set up. The petitioner was discharged on 9.4.1970 and thereafter joined BSF as Assistant Commandant on 29.7.1970. At the relevant time, the BSF had not framed its own rules and it was governed by the Central Reserve Police Force (for short: CRPF), Rules.

Rule 43 of the said rules provided that the age of superannuation of an officer of the BSF who reaches the rank of Commandant was 55

years and those who were promoted above this rank superannuated at the age of 58 years. Rule 102 of the rules provided that if the rules were silent, the condition of service would be same as applicable to other permanent employees of the Government.

In the year 1978, the BSF framed its own rules. In these rules also the provisions at the relevant time were similar. The petitioner was to retire on 6.3.1991 on reaching the age of superannuation. He was, however, given extension of six months and actually retired on 6.9.1991. After giving him the benefit of the service rendered by him in the State of H.P. and in the Army his qualifying service was found to be 29 years and 9 months and his pension was fixed by giving the benefit of 30 years of service.

The petitioner filed the present petition claiming that since the age of retirement of BSF officials was only 55 years as against the normal age of 58 years in regular government service, the maximum pension should be paid on completion of 30 years service instead of 33 years as required under the Pension Rules. The case of the petitioner was based on various judgments delivered by the High Court of Delhi and High Court of Jammu & Kashmir. In these judgments, the said Courts relied upon the observations of the Supreme Court in **Raghu Nandan Lal Chaudhary and others v. Union of India,** AIR 1988 SC 2125 and held that employees of the BSF retiring at the age of 55 years would be entitled to receive full pension on completion of 30 years of service. However, during the pendency of the present petition, the apex Court settled the law in this regard in **Union of India and another** v. **Satish Kumar** (2006) 1 SCC 360, in which the Court observed that the

decision in ***Raghu Nandan's*** case (*supra)* did not lay down any proposition of law and held as follows:-

> "11. We are unable to agree that *Raghu Nandan* case decides any proposition of law. There is no reasoning in that case. There is no reference to any rule or to any other provision which would govern payment of pension. Thus, the observations in *Raghu Nandan* case must be confined to that case only. They cannot be used to give benefit to all and sundry.
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> 12. So long as it is an admitted position that Rule 49 governs, payment of pension in all these cases, could only be as per the Rules. When there is no challenge to the Rule and there is no ground of discrimination taken in any of the petitions the Rule cannot be bypassed."

After the aforesaid judgment was passed, the petitioner moved an application for amendment of the writ petition and has laid challenge to Rule 49 of the CCS (CCA) Pension Rules which provides that maximum pension shall be paid only on completion of 33 years of qualifying service. The amendment was allowed.

Rule 49 of the CCS (CCA) Pension Rules reads thus:-

> **"49. Amount of pension**----(1) In the case of a government servant retiring in accordance with the provisions of these Rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half month's emoluments for every completed six monthly period of qualifying service.
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> (2)(a) In the case of a government servant retiring in accordance with the provisions of these Rules after completing qualifying service of not less than thirty-three years, the amount of pension shall be calculated at fifty percent of average

emoluments, subject to a maximum of four thousand and five hundred rupees per mensem;

(b) in the case of a government servant retiring in accordance with the provisions of these Rules before completing qualifying service of thirty-three years, but after completing qualifying service of ten years, the amount of pension shall be proportionate to the amount of pension admissible under clause (a) and in no case the amount of pension shall be less than rupees three hundred and seventy-five per mensem;"

I have heard Mr. O.P.Thakur, learned counsel for the petitioner whose main contention is that since the age of retirement of the petitioner and similarly situated employees of the BSF was 55 years, whereas normal age of retirement in other government institutions is 58 years, the requirement of the above rule that 33 years of qualifying service is necessary for entitlement of full pension is arbitrary and discriminatory as far as persons retiring at a lower age is concerned. He, therefore, contends that the rules should be either struck down or read down to entitle a person retiring at the age of 55 years to get full pension on completion of 30 years of service. Mr. Thakur has also submitted that the rule is also bad, inasmuch as, it requires the petitioner to fulfil an impossibility and is hit by the maxim *Lex non cogit a impossibilia*, i.e. the law forces not to fulfil impossibilities. In support of his contention, Mr. Thakur has urged that as far as the petitioner is concerned, he stands on equal footings with all other government employees as far as pension is concerned. However, the retirement age of the petitioner has been fixed at 55 years. Therefore, according to the petitioner, he should be given the benefit of three years and qua him the qualifying service for

entitlement to get full pension should be 30 years and not 33 years as in the case of other government employees. Mr. Thakur has relied upon the following judgments of the apex Court in **State of A.P. and others v. Mcdowell and Co. and others** (1996) 3 SCC 709, **Ganga Ram Moolchandani v. State of Rajasthan and others,** (2001) 6 SCC 89, **State of A.P. and others v. Nallamilli Rami Reddy and others,** (2001)7 SCC 708 **and State of T.N. and another v. P.Krishnamurthy and others,** (2006) 4 SCC 517.

It is not necessary for me to deal in details with all the aforesaid judgments. The position of law with regard to striking down any law including a rule is consistent. The same has been succinctly expressed in the latest judgment of the apex Court wherein the Court in State of Tamil Nadu's case (*supra*) held as follows:-

> "15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a subordinate legislation can be challenged under any of the following grounds:
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> (a) Lack of legislative competence to make the subordinate legislation.
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> (b) Violation of fundamental rights guaranteed under the Constitution of India.
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> (c) Violation of any provision of the Constitution of India.
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> (d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
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> (e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

16.The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."

A perusal of this judgment clearly show that there is always a presumption in favour of constitutionality of a subordinate legislation and the burden is on the person who attacks such legislation on the ground that it is invalid to show why it is invalid. The attack on behalf of the petitioner is mainly on the ground that there is violation of Article 14 of the Constitution of India, in as much as, un-equals are being treated equally. I am unable to accept the arguments raised by the petitioner. Even the BSF Act itself provides different ages of retirement for different categories of officers according to the level they reach at the time of the retirement. In the Armed Forces and Para Military forces like BSF, sometimes it is essential to have different retirement ages at different levels of the hierarchy. A person shall reach a higher level only if he is better at his job. Persons who are average or below the mark may retire

earlier. This does not mean that those who retire earlier should now get full pension. This would amount to rewarding the unworthy.

It is settled law that the pension is not a bounty. An employee is entitled to his pension for the services rendered by him. A very important and legitimate criteria for fixing the pension is the length of service rendered by an employee. Longer the service rendered greater the pension. This is a very reasonable classification which has an obvious nexus with the object. The object being that an employee who has rendered long service should get better pension.

Merely because the retirement age in the cases of some persons is higher or lower than the normal age of employees is no ground to set aside the rules._ In the present case, at the time when the petitioner retired from civil services, even Class IV employees used to retire at the age of 60 years. For them also the qualifying service to receive maximum pension is 33 years. Length of service will also depend on the age when the person is recruited to service. There are many services which are governed by the pension rules. The date of entrance to these services can be different. In some services, persons at the age of 18 years are eligible to enter service. In some services, the minimum age is 21 years and for some services, the minimum age is higher. All these persons will have different lengths of service available to them when even if they join at the minimum age prescribed. It is apparent that the qualifying service to receive maximum pension cannot be fixed on the basis of length of service which an employee can achieve. The same can be fixed in accordance with the length of service actually rendered by him. This is the only reasonable criteria to fix the pension.

It was lastly contended by Mr. Thakur that in view of the principle of *Lex non cogit a impossibilia*, the petitioner cannot be asked to perform impossibilities since according to Mr. Thakur, no person could achieve 33 years qualifying service. Mr. Thakur has relied upon the following judgments in support of his plea in **Dev Ashish Bhattacharya v. Punjab National Bank and another,** 1984 ILR (HP Series) 392, **State of Rajasthan and another v. Shamsher Singh**, 1985(Suppl) SCC 416, **Special Reference No.1 of 2002, (Gujarat Assembly Election Matter),** (2002)8 SCC 237 and **Standard Chartered Bank and others v. Directorate of Enforcement and others,** (2005) 4 SCC 530.

Even this argument of Mr. Thakur cannot be accepted. First of all, there is no factual basis for this argument even in the amended petition nor any allegations in this behalf have been made. Even if this contention is allowed to be raised, the same is without basis. A person can be recruited to the BSF even as an officer at the minimum age of 21. Therefore at the age of 55 he could have completed 34 years of service. A person recruited in the BSF even after the age of 21 if promoted to a level above the level of Commandant would have been entitled to retire at the age of 58 years. Even as per the amended rules which were amended in 2003, the retirement age of an officer upto the level of Commandant is 57 years and for those reaching a higher level it is 60 years. I am of the opinion that even on facts, the maxim is not applicable.

Keeping in view the above facts, the petition is dismissed with no order as to costs.

August 22 , 2006. (Deepak Gupta), J.
s.